

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2020-242-E - ORDER NO. 2021-37  
JANUARY 19, 2021

IN RE: Enrique McMilion, Jr,	)	ORDER DENYING MOTION TO
Complainant/Petitioner v. Duke	)	DISMISS OF DUKE ENERGY
Energy Carolinas, LLC,	)	CAROLINAS, LLC AND DENYING
Defendant/Respondent	)	THE COMPLAINANT'S MOTION
	)	FOR DISCOVERY

These matters come before the Public Service Commission of South Carolina (“Commission”) upon the Motion for Discovery filed on October 15, 2020, by the Complainant, Mr. McMilion, and a Motion to Dismiss filed by Duke Energy Carolinas, LLC on November 2, 2020, in Docket No. 2020-242-E. For the reasons stated herein, the Commission denies both Motions.

**I. COMPLAINANT’S MOTION TO DISMISS**

To the extent that the Complainant’s filing is a Motion asking this Commission to order discovery, that Motion for Discovery is denied. Motions are not the appropriate mechanism for initial discovery requests. The regulations governing discovery in Commission proceedings are contained in S.C. Code Ann. Regs. 103-832 through 103-835. Specifically, the procedure for seeking discovery through interrogatories or requests for production is governed by S.C. Code Ann. Regs. 103-833. Commission Regulation 103-833(B) provides in relevant part that “Any party of record may serve upon other parties or parties of record written interrogatories to be answered by the party served.” Likewise, Commission Regulation 103-833(C) provides in relevant part that “Any party of record may serve upon other parties or parties of record requests for production of

documents and things to be answered by the party served.” Both subsections require copies of the interrogatories or requests for production served to be filed with the Chief Clerk of the Commission. The Regulation does not require a motion for serving interrogatories or requests for production, and there is no reason in this matter to deviate from the procedure set forth in the Regulation. If Mr. McMilion seeks discovery from the Defendant, the Complainant shall make and serve his discovery requests directly upon the Defendant with copy to all parties of record and file the discovery request with the Commission’s Chief Clerk.

## **II. DUKE ENERGY CAROLINAS, LLC’S MOTION TO DISMISS COMPLAINT**

Pursuant to S.C. Code Ann. § 58-27-1990, S.C. Code Ann. Regs. 103-829 and 103-352, and applicable South Carolina law, Respondent, Duke Energy Carolinas, LLC (“DEC” or the “Company”), answered the Complaint filed in the above-referenced proceeding and moved the Commission to dismiss the above-captioned matter by asserting the following grounds:

- (1) the doctrine of *res judicata* bars the Complaint inasmuch as this is Mr. McMilion’s fourth complaint before the Commission regarding the same subject matter; (2) this is a predicament of Mr. McMilion’s own making because he has failed to avail himself of the Manually Read Meter option; and (3) the Complaint makes no allegation that the Company has violated any statute, rule, regulation or order administered or issued by the Commission as required by S.C. Code Ann. Regs. 103-824—there are therefore no facts at issue in the Complaint that would entitle Complainant to relief from the Commission—and a hearing is not required in this case for protection of substantial rights.<sup>1</sup>

---

<sup>1</sup> Duke Energy Carolinas, LLC’s Answer and Motion to Dismiss at 1.

**A. Standard of Review**

**(1) *Res Judicata***

*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999); Rogers v. Kunja Knitting Mills, U.S.A., 336 S.C. 533, 520 S.E.2d 815 (Ct. App. 1999). *Res judicata* prevents a litigant from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Commission of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987); accord Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). *Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. *Res judicata* ends litigation, promotes judicial economy and avoids the harassment of re-litigation of the same issues. James F. Flanagan, South Carolina Civil Procedure 642 (2d ed. 1996).

To establish *res judicata*, the defendant [here, respondent] must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Rogers, 336 S.C. at 537, 520 S.E.2d at 817; Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). **Even when the defendant meets all of the required elements, *res judicata* will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies. Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).** (emphasis added)

**(2) *Failure to State a Claim – No Violation of Rule, Regulation, or Statute:***

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003), cert. denied (citing Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d

69 (1999)). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams v. Condon, 347 S.C. at 233, 553 S.E.2d at 499 (finding that trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

“A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.” Flateau v. Harrelson, 355 S.C. at 202, 584 S.E.2d at 415; see Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); see also Baird v. Charleston County, 333 S.C. at 527, 511 S.E.2d at 73 (declaring that if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (concluding that motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry v. Yonce, 337 S.C. at 5, 522 S.E.2d at 139; see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (explaining that looking at facts in light most favorable

to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001); *see also* Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997) (stating motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

### **III. FINDINGS AND CONCLUSIONS OF LAW**

The Commission finds that 1) the Complainant is not barred from the immediate action by *res judicata*; even if all the elements of *res judicata* were to be proven by the movant, public policy dictates that the Complainant is entitled to a hearing, and 2) the Complainant has complied with S.C. Code Ann. Regs. 103-824, and therefore the Complainant's action is not subject to dismissal for a failure to state a cause of action that constitutes a violation of Commission rule, regulation, or statute. In regard to the alleged basis for dismissal that "this is a predicament of Mr. McMilion's own making because he has failed to avail himself of the Manually Read Meter option," the Commission finds that this is a question of fact that would be better evaluated during the course of a hearing.

#### **IT IS THEREFORE ORDERED:**

1. The Complainant's Motion for Discovery is denied.
2. The Company's Motion to Dismiss is denied.

3. This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:



A handwritten signature in blue ink, appearing to read "Florence P. Belser", is written over a horizontal line.

Florence P. Belser, Vice Chairman  
Public Service Commission of  
South Carolina